IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-4561

MICHAEL O'LOONEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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LIST OF AUTHORITIES

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PRAYER

The Petitioner, Michael O'Looney, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit in this proceeding entered on August 31, 1976.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, not yet reported, affirming the judgment of conviction below, is attached hereto and appears in Appendix "A."

STATEMENT OF JURISDICTION

The Petitioner, Michael O'Looney, appealed his conviction in the United States District Court for the Southern District of California to the United States Court of Appeals for the Ninth Circuit. On August 31, 1976, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether a person originally detained legally by local police may subsequently be held in custody without being charged and without being taken before a magistrate solely for the purpose of investigation and interrogation to ascertain whether or not he had been involved in criminal activity; and until he consented to a search of his automobile and home and gave a written statement to Federal investigators; and whether any statement given during such detention must be suppressed notwithstanding that the declarant was given his *Miranda* warnings on two occasions?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment where indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

1. Title 18, § 371 states:

> "*Conspiracy to Commit Offense or to Defraud United States.*
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner, or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisonment for not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

2. Title 22, § 1934 U.S.C. states:

"*Munitions Control – Authority of President.*

"(a) The President is authorized to control, in furtherance of world peace and the security and foreign policy of the United States, the export and import of arms, ammunitions, and implements of war, including technical data relating thereto, other than by a United States Government Agency. The President is authorized to designate those articles which shall be considered as arms, ammunitions, and implements of war, including technical data thereto, for the purpose of this section."

"*Registration of Manufacturers, Exporters, and Importers.*

"(b) As prescribed in regulations issued under this section, every person who engages in the business of manufacturing, exporting, or importing any arms, ammuntion, or implements of war, including technical data relating thereto, designated by the President under subsection (a) of this section shall register with the United States Government Agency charged with the administration of this section, and, in addition, shall pay a registration fee which shall be prescribed by such regulations. Such regulations shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies or for any State or local enforcement agency) or any military firearms or ammunition of United States manufacturer furnished to foreign governments by the United States under this chapter or any other foreign assistance program of the United States, whether or not advanced in value

or improved in condition in a foreign country. This prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.

"*Penalties for Violations.*

"(c) Any person who wilfully violates any provision of this section or any rule or regulation issued under this section, or who wilfully, in a registration or license application, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein, or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $25,000 or imprisonment for not more than two years, or both.

"*Applicability to Canal Zone.*

"(d) This section applies to and within the Canal Zone.

"*Reports to Congressional Committees of Licenses Issued for Export of Articles in Excess of $100,000; Contents.*

"(e) Licenses issued for the export of articles on the United States Munitions List in excess of $100,000 shall be reported promptly to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives, which report shall contain —

(i) the items to be exported under the license;

(ii) the quantity of each item to be furnished;

(iii) the name and address of the consignee and of the ultimate user of each such item; and

(iv) an injunction whenever appropriate, concerning the necessity to protect the confidentiality of the information provided.

STATEMENT OF THE CASE

The Petitioner, Michael O'Looney, was charged in five counts. The first count was for conspiring to engage in the business of exporting arms without registering with the State Department and making a false statement with respect to information required to be kept in the records of a federally licensed firearms dealer in violation of 18 U.S.C. § 371 and § 924(a) and 22 U.S.C. § 1934. The other four counts were for aiding and abetting the making of false statements in violation of 18 U.S.C. § 2 and § 924(a).

Trial was by a jury. The defendant was acquitted on counts two through five, both inclusive. However, the jury returned a verdict of guilty of that portion of Count One which charged a conspiracy to engage in the business of exporting arms in violation of 22 U.S.C. § 1934. The trial judge sentenced Mr. O'Looney to a period of five years' probation and a fine of $5,000.

It is from this judgment and sentence that the Petitioner appealed.

Although Michael O'Looney was born in Ireland, he had been in the United States for over 20 years and had been a citizen for about five years. After a trip to Ireland, Mr. O'Looney agreed with one Shannon Harper that he, O'Looney, would furnish money in order to help "the cause" in Ireland. Mr. O'Looney did furnish money and Harper proceeded to purchase several guns with the money, at times using false identification.[1]

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1. Shannon Harper testified concerning O'Looney's alleged involvement in the acquisition and use of false identifications; in the illegal purchase of guns; and in various attempts to conceal not only evidence, but also the purpose of the alleged scheme. The jury, though, by acquitting Mr. O'Looney of Counts Two through Five and part of Count One, demonstrated beyond cavil its disdain for Harper's credibility and its disregard for his testimony. The acquittal requires that we assume Mr. O'Looney's innocence of any of those activities.

On the morning of April 25, 1974, Harper requested that O'Looney accompany him to San Diego for the purpose of purchasing a gun. O'Looney presumed that Harper was legally purchasing all of the guns so he agreed to meet him later. Sometime around 2:30 or 3:00 p.m., Harper called and asked O'Looney if he would meet him in San Diego. O'Looney did and gave Harper $35 to put down as a deposit on a gun. Although Harper went into the store alone, the gun store owner testified at the trial that he noticed another individual some distance away whom he identified as O'Looney.

A week later, on May 2, 1974, O'Looney again drove Shannon Harper to the same gun store to pick up the gun on which the deposit had been placed. Harper was dropped off at the store and O'Looney parked the car a few blocks away. While in the store, Harper aroused the suspicions of the owner, who called the police.

At approximately noon on May 2, San Diego police officers received a radio call concerning possibly suspicious persons inside a gun shop apparently trying to buy weapons. The first officer to reach the scene was Patrolman Edward Kelso. As he entered, he observed a single individual leaving the shop. The owner of the store identified that individual as the suspicious person. He told Officer Kelso that the man had just attempted to buy a gun; and had previously filled out an application for a gun

purchase on which he had given a non-existent address. Officer Kelso was shown a copy of the receipt for deposit on which he noted the address and realized it was in fact non-existent. He then asked the man, who later turned out to be Shannon Harper, to furnish some identification and was given a form of military identification card which was also later found to be false.

At approximately the same time, Officer Catherine Nance also responded to the call in her police vehicle. She did not go into the store, but contacted a neighbor, Mrs. Reese, who informed her that a second individual had been in the vicinity on foot. At just about that time Mr. O'Looney approached the corner. He had purchased a newspaper and was walking nonchalantly toward Officer Nance. Mrs. Reese pointed out Mr. O'Looney as a person "possibly being involved in whatever situation the police were investigating". Although Mr. O'Looney was walking toward her carrying a newspaper and was not acting suspiciously in any manner, Officer Nance, based solely on Mrs. Reese's suggestion, accosted him and asked for identification. He produced authentic identification and credit cards and cooperated with her fully. Although Officer Nance at that time felt Mr. O'Looney may possibly be the subject of arrest, she gave him no *Miranda* warning.

After furnishing identification and credit cards, Mr. O'Looney was asked by Officer Nance if he knew the man in the store. He said that he did not. It is significant to note that Officer Nance did not yet know the identification of the individual in the store, or, for that matter, whether any suspicious individual had been taken into custody.[2] When she asked Mr. O'Looney

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2. At this time Harper was standing outside the store with Officer Kelso.

if he had a vehicle in the area he told her he had one parked a few blocks away. Officers Nance and Kelso conferred and agreed among themselves that they should try to "get more information". Consequently, Officer Nance secured the defendant's agreement that he would be willing to go to his car. O'Looney was then patted down for weapons, locked in the back of a marked police vehicle and driven to his automobile. The police were uncertain whether or not he was handcuffed at this time.

Upon arrival at his car, while still in custody and locked in the back of Officer Nance's police car, Mr. O'Looney was asked if he would give permission to search the car. When he said that he would, a short informal consent was written out by Officer Nance on the scene. Mr. O'Looney still had not been advised of his rights; nor had he been arrested formally. Nevertheless, he felt that he was in the custody of the police; that his liberty was restricted; and that he had no right to refuse a search. He felt that even if he did refuse to give permission, the car would be searched anyhow. The resulting search disclosed a clothes bag in which materials were found that convinced both officers that "further investigation was required". But, O'Looney was still not arrested.

Although Officers Kelso and Nance had no specific charges upon which to hold Mr. O'Looney, they nevertheless again locked him in the back of the police vehicle and took him to the central police station for further investigation. There he was turned over to Officer Oberlies of the Investigation Division. At the station, Detective Oberlies notified Federal authorities that there may be some Federal involvement, questioned Harper and O'Looney alternatively, and finally warned O'Looney of his right to remain silent and to have counsel. He had been in custody for approximately two hours.

Although the defendant had been brought to the station shortly after noon, Federal agents did not arrive until approximately 3:00 p.m. In the meantime, Detective Oberlies continued questioning O'Looney. However, he admitted there was no evidence whatsoever that O'Looney had committed any crime, state or federal. As a matter of fact, the defendant was detained solely on "just suspicion", and the possibility that he may have been involved in some unidentified Federal crime.

When treasury agents arrived, O'Looney was again given his *Miranda* warning and a statement was taken. At this point, the Federal agent asked O'Looney if he would consent to a search of his home and O'Looney agreed. Accordingly, a consent to search was prepared and signed by the defendant at approximately 3:55 p.m.

O'Looney, in the custody of state and federal agents, was then driven to his home and a search was conducted from about 5:00 p.m. until approximately 7:00 p.m. While the federal agents searched, the state policeman watched Mr. O'Looney, and at one time told him he better not make any false moves.

Throughout the entire time from when he was first taken into custody at 12:00 Noon until he was returned to his automobile at approximately 8:00 p.m., O'Looney was never told that he was not under arrest and was free to go at any time. During that period, he was given no food and afforded only the barest comforts. It was only after he had given a statement and consented to the search of his automobile and home that Mr. O'Looney was permitted to go free. He was not arrested that night; no complaint ever issued; and he was never taken before a magistrate.

REASONS FOR GRANTING THE WRIT

THE ILLEGAL DETENTION OF THE PETITIONER VIOLATED HIS FOURTH AND FIFTH AMENDMENT RIGHTS AND THEREFORE ANY STATEMENT GIVEN DURING THAT DETENTION SHOULD HAVE BEEN SUPPRESSED.

We will, for the purpose of this Petition, agree with the conclusion of the Ninth Circuit Court of Appeals that Officer Nance's original detention and interrogation of Mr. O'Looney was lawful. (Appendix "A")[3] The Court of Appeals, however, went further and held that the continuing detention of the Petitioner, though solely for the purpose of investigation, did not turn the initial stop into an illegal detention. It is our position that this holding runs contrary to clear mandates previously set forth by this Court and to holdings under analogous circumstances by the Courts of Appeals of the various other circuits.

Despite Government protestations to the contrary, the record is clear that at every stage of the arrest and de-

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3. Although the evidence showed that the defendant was walking along the public street at high noon and acting in a completely unsuspicious manner, the Court of Appeals nevertheless declined to overrule the trial court's determination that the original stop of O'Looney was supported by reasonable suspicion and was thus reasonable under the Fourth Amendment (Appendix A, p. 3).

tention of Mr. O'Looney – the initial stop, the search of the automobile, the transportation to police headquarters, the interrogation by the police and by federal agents, the obtaining of a statement, and the search of Mr. O'Looney's home—the *only objects* of the federal and local authorities were investigative and to secure a statement. At no time prior to or during his detention was there any thought of placing Mr. O'Looney under arrest for the very simple reason that neither the local nor federal authorities felt they had any probable cause upon which to base a complaint. Indeed, even after the Petitioner had given his statement and after his car had been searched, he was still told by the federal agent in charge of the investigation that he was not under arrest. But he was never told that he was free to leave; on the contrary, he was led to believe by circumstances and statements that he was under arrest.

Candor compels us to admit the police did have some suspicion that Mr. Harper may have attempted to commit some unidentified crime in the gun store at which he was apprehended; and perhaps some, but certainly much less suspicion that Mr. O'Looney may have been involved in some manner. Still, based upon this feeble foundation, the Petitioner was held in custody, not to ascertain his identity (no prints or photos were taken), not to corroborate his account of his actions, not to prepare a complaint or to find a magistrate so that he might be charged; but solely and exclusively further to investigate for the purposes of ascertaining whether any crime had in fact been committed by him. This in itself, regardless of the legality or illegality of the initial detention, amounts to a

deprivation of constitutional rights and mandates a reversal of the conviction.[4]

The record reflects that the defendant was in custody for approximately four hours (12:00 Noon until 3:55 p.m.) prior to his signing the statement. Furthermore, he was held at least three, and perhaps four hours longer so that his home could be searched too. We do not, however, base our constitutional argument merely upon the lapse of time; that is not the critical question. Rather must we focus upon the purpose for that delay and the activities of the interrogating officers during the period.

The courts of the United States, with virtual unanimity, have condemned the practice of detaining a suspect exclusively, or even primarily, for random investigation or to secure a confession, admission or statement. *Brown* v. *Illinois,* 422 U.S. 590 (1975); *United States* v. *Middleton,* 344 F. 2d 78, 82 (2nd Cir., 1965); *Ginozea* v. *United States,* 279 F. 2d 616, 621 (9th Cir., 1960).

For example, when a suspect was detained between his arrest and his appearance before a magistrate solely to obtain a statement, only 30 minutes was found by the District of Columbia Circuit to have destroyed the spontaneity of a confession, and that confession was accordingly suppressed. *Spriggs* v. *United States,* 335 F. 2d 283 (D. C. Cir., 1964).

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4. At the trial and in the Court of Appeals it was the position of the defendant that his consent to search the automobile, which resulted in obtaining evidence that required further investigation according to the police, was itself involuntary under *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973) and *United States* v. *Rothman,* 492 F. 2d 1260 (9th Cir., 1973).

Likewise, an admission was suppressed when it was shown the police held a suspect in his vehicle for a relatively short time after having taken him into custody for the purpose of investigative interrogation. *Greenwell* v. *United States,* 336 F. 2d 962 (D. C. Cir., 1964)

That the Ninth Circuit has adopted the usual rule is demonstrated by the holding in *Morales* v. *United States,* 344 F. 2d 846 (9th Cir., 1965). In that case the defendant was turned over to federal authorities after having been in state custody for approximately 14 hours. He was not taken before a commissioner until three hours later. However, while in federal custody, the defendant was interrogated by narcotic agents for about one and one-half hours and, during that period, made certain admissions.

The Ninth Circuit Court of Appeals reversed the conviction on the grounds that the defendant had been detained primarily, if not exclusively, for interrogation and to procure admissions. That detention was illegal even though his original arrest may have been legal.

Even more so in our case, the admitted purpose for detaining the Petitioner was not primarily, but exclusively to obtain an admission or some other statement, and to conduct searches, albeit with consent. Accordingly, if for no other reason, that admission should have been suppressed and its reception into evidence constituted a denial of Fourth and Fifth Amendment rights.

> "Presumably, whoever the police arrest they must arrest on 'probable cause'. It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause'." *Mallory* v. *United States,* 354 U.S. 449, 456 (1957).

Circuit Judge Hufstedler, dissenting in part from the Opinion below, recognized that if the detention was illegal, there was a serious question as to whether or not the defendant's Fourth Amendment rights had been violated and purged from the illegal taint. (Appendix "A", p. 15)

Nor is it of any moment whatsoever that, prior to giving the statement, the Petitioner was afforded his full *Miranda* warnings. It was just such a contention that was rejected by this Court in *Brown* v. *Illinois,* 422 U.S. 590 (1975).

In that case, the defendant was arrested without probable cause and under circumstances indicating the arrest was purely investigatory. Before questioning, he was warned of his constitutional rights and subsequently gave two in-custody inculpatory statements. A pre-trial motion to suppress was denied and the conviction was affirmed by the Supreme Court of Illinois. In affirming, the Illinois court recognized the unlawfulness of the arrest, but found that the constitutional warnings had served to break the causal connection between the illegal arrest and the statement.

This Court reasserted its holding in *Wong Sun* v. *United States,* 371 U.S. 471 (1963) to the effect that a statement obtained after an illegal arrest (or presumably after a legal arrest had become illegal by virtue of unlawful detention) must be excluded unless an "intervening independent act of free will" resulted in the statement. This Court observed that the rights protected by the *Miranda* warnings are primarily conferred by the Fifth Amendment, whereas the *Wong Sun* doctrine protects the right to be free from illegal searches and seizures within the purview of the Fourth Amendment. Therefore, it was held

that the *Miranda* warning will not, in itself, serve as an independent intervening force so as to vitiate the effects of an otherwise illegal detention.

Mr. Justice Blackmun, for the Court, reasoned at 422 U.S. 602, 603:

> "If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . Arrests made without warrant or without probable cause, for questioning or 'investigation' would be encouraged by the knowledge that evidence derived therefrom hopefully could be made admissible at trial by the simple expedient of giving the *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all' and the constiutional guarantee against unlawful searches and seizures could be said to be reduced to a 'form of words'."

The Court's attention is respectfully directed to the remarkable similarity between the facts presented by the case currently at issue and those previously determined to be so fraught with illegality as to constitute a constitutional violation as a matter of law. Thus:

> "The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning'. . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was affected gives the appearance of having been calculated to cause surprise, fright and confusion." 442 U.S. 590, 605.

So, too, in this case, even assuming that Mr. O'Looney's initial detention was reasonable and legal, all subsequent time that he was held in custody was solely for the purpose of "investigation", without probable cause. He was held by the San Diego police on a gossamer-like suspicion in the hope that something might turn up indicating a possible violation of Federal or state law. There was no intervening cause between the time he was transported to the police station and the time he gave the statement. Every attitude, remark and suggestion was clearly calculated to instill in him confusion, fear and uncertainty. Finally, and most egregious of all, Mr. O'Looney was not released until he had given a statement and until both his car and his home had been thoroughly searched.

It is respectfully submitted that such a careless indifference to fundamental rights guaranteed by the Constitution of the United States cries out to this Court for remedy. The only remedy is reversal.

> "The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guarantee in the only effective available way – by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960)

CONCLUSION

For the above and foregoing reasons a Writ of Certiorari should issue to review the judgment and Opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MICHAEL O'LOONEY,
Defendant-Appellant.

No. 75-2666
OPINION

[August 31, 1976]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

Before:

HUFSTEDLER and WALLACE, Circuit Judges,

and

SMITH,* District Judge.

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*Honorable Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

WALLACE, Circuit Judge:

O'Looney was involved in an alleged plot to export guns illegally to Ireland for use by the Irish Republican Army. He was indicted on five counts. One count was for conspiring to engage in the business of exporting arms without registering with the State Department and conspiring to make a false statement with respect to the information required to be kept in the records of a federally licensed firearms dealer, all in violation of 18 U.S.C. §§ 371 and 924(a) and 22 U.S.C. § 1934. The other four counts were for aiding and abetting the making of false statements in violation of 18 U.S.C. §§ 2 and 924(a). O'Looney was convicted by a jury on the part of the first count charging a conspiracy to engage in the business of exporting arms and acquitted of all other counts. We affirm.

O'Looney was born and raised in Ireland. He had lived in the United States for over 20 years and had been a naturalized citizen for about five years. He became interested in the movement to reunify Ireland. After a trip to his homeland, he agreed with co-defendant Harper[1] to purchase weapons for the cause. O'Looney furnished the money and Harper, at times using false identification, purchased the weapons. At the time the plot first came to the attention of police, Harper had purchased at least six semi-automatic rifles at five different stores in the San Diego area and had paid a deposit on a seventh.

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1. Several months before O'Looney's trial, Harper pleaded guilty and his case was severed from O'Looney's.

On appeal, O'Looney claims that evidence and statements obtained in violation of his Fourth and Fifth Amendment rights should have been suppressed, that the evidence was insufficient to support his conviction and that he was prejudiced by use of a special verdict form.

I. The Auto Search

On one of their gun-purchasing ventures, Harper's unusual behavior aroused the suspicion of the gun store owner. After Harper left the store he was observed talking to O'Looney. Harper returned to the store to place a cash deposit on a semi-automatic rifle and produced identification containing what the owner believed to be a false address. The owner sent a letter to Harper at that address; it was returned marked "no such address." Harper returned to the store about a week later to pick up the rifle he ordered. The owner called the police and the first officer to arrive questioned Harper and the owner. The owner directed the second officer, a policewoman, to a neighbor who had been keeping an eye on O'Looney. The neighbor pointed out O'Looney, walking along the sidewalk. O'Looney produced identification upon request and denied knowing the man in the store (Harper). He stated that he had a car a few blocks away and agreed to go there in a police car. He also agreed to allow his car to be searched and signed a statement to that effect. The search produced evidence connecting O'Looney with Harper and prompted the police to investigate further.

There is no doubt but that the policewoman properly detained O'Looney for the initial inquiry. The attempted purchase of firearms with false identification was a crime, 18 U.S.C. § 922(a)(6), and O'Looney had been identified as a possible accomplice. There was thus reasonable suspicion to support the preliminary investigation. *Adams* v. *Wil-*

liams, 407 U.S. 143, 145-46 (1972); *Terry* v. *Ohio,* 392 U.S. 1, 21-23 (1968).

O'Looney claims that the search was illegal, however, because it was made without a warrant. The government responds that O'Looney voluntarily consented to the search. This is a question of fact, *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 248-49 (1973), upon which the government had the burden of proof by a preponderance of the evidence. *See United States* v. *Matlock,* 415 U.S. 164, 177-78 and n. 14 (1974); *Lego* v. *Twomey,* 404 U.S. 477, 488-89 (1972). The trial judge found that the government met this burden. We will reverse such a finding only if in viewing the evidence in the light most favorable to the government, *United States* v. *Sherman,* 430 F. 2d 1402, 1404 (9th Cir. 1970), *cert. denied,* 401 U.S. 908 (1971), we conclude that it is clearly erroneous, *United States* v. *Rothman,* 492 F. 2d 1260, 1264 (9th Cir. 1973); *United States* v. *Page,* 302 F. 2d 81, 85 (9th Cir. 1962) (en banc).

We cannot conclude that the trial court's finding was clearly erroneous. The Supreme Court has noted that there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 224. Instead, the Court has stated that the issue is one "of fact to be determined from all the circumstances." *Id.* at 248-49.

O'Looney submitted an affidavit alleging that he consented only because he was in custody, frightened and totally out of his element and because he was misled into believing that he must consent to allay police suspicion. However, the evidence was to the contrary. O'Looney was not especially vulnerable to coercion because of youth, lack of education or low intelligence. *See, e.g., Payne* v.

Arkansas, 356 U.S. 560, 562 and n. 4, 567 (1958); *Fikes* v. *Alabama,* 352 U.S. 191, 193, 197-98 (1957); *Haley* v. *Ohio,* 332 U.S. 596, 599-600 (1948). It appears that he was a sophisticated businessman with interests in California, Illinois and Ireland, and that he had often sought legal advice in business affairs. Indeed, he had consulted his attorney about the legality of the arms purchasing scheme itself.

Nor was O'Looney subjected to a lengthy detention, prolonged interrogation or physical punishment. *See, e.g., Ashcraft* v. *Tennessee,* 322 U.S. 143, 153-54 (1944); *Chambers* v. *Florida,* 309 U.S. 227, 239 (1940); *Brown* v. *Mississippi,* 297 U.S. 278, 281-83 (1936). O'Looney agreed to take the police to his car after only a few minutes of questioning on a public sidewalk. There were no drawn weapons, no evidence of handcuffs, no overt force and no threats. The trial judge found that the policewoman who obtained O'Looney's consent was not "an overpowering woman and would [not] have scared Mr. O'Looney into doing anything he didn't voluntarily want to do." O'Looney makes much of the fact that he was locked in the back of the police car for the short ride from the gun store to the car and during the search. He agreed to ride in the police car, however, while standing on the sidewalk. He was also out of the car and on the sidewalk when he agreed to the search. Although the police did not specifically tell O'Looney of his right to refuse consent, they were not required to do so. *Schneckloth* v. *Bustamonte, supra.* O'Looney was not misled by the police into believing he had no such right. *See, e.g., Bumper* v. *North Carolina,* 391 U.S. 543, 548-50 (1968).

We conclude from the totality of the circumstances that the trial court's finding of voluntary consent is not clearly

erroneous. In fact, it appears that O'Looney freely consented to the search in a voluntary effort to allay police suspicion. Indeed, O'Looney's attorney argued to the jury that O'Looney "freely and fully signed a consent, and permitted them to search his car."

II. The Statement

The car search produced evidence that O'Looney was connected with Harper. He was transported to the San Diego Police Station where, after *Miranda* warnings were given, he again denied he knew Harper. Federal Alcohol, Tobacco & Firearms (ATF) agents had been called. When they arrived, they again gave O'Looney his *Miranda* warnings and he then signed a statement in which he swore that he and Harper had decided to obtain guns for Ireland.

O'Looney first contends that the statement was involuntary. The government must demonstrate voluntariness by a preponderance of the evidence. *Lego* v. *Twomey, supra,* 404 U.S. at 488-89; *United States* v. *Cluchette,* 465 F. 2d 749, 754 (9th Cir. 1972). The district court found the statement voluntary and admissible. We cannot reverse that finding in the absence of clear error. *Id.* at 754. We find no clear error here.

As pointed out earlier, O'Looney was a sophisticated businessman, and had a regular attorney whom he had previously consulted about his rights. Full *Miranda* warnings were given twice, yet O'Looney without hesitation waved his rights to silence and the presence of his attorney. He was not subject to lengthy interrogation. He was not questioned on the way to the police station from the gun store. When he arrived at the station, a detective informed him of his rights and questioned him for ten to fifteen minutes about his connection with Harper and their

reasons for purchasing guns. The detective later talked to him for five or ten minutes more. Then, satisfied that no violation of local law had been committed, he placed O'Looney in an interrogation room to await the arrival of ATF agents. Within an hour after the agents' arrival, O'Looney had given a complete statement, waited for it to be written up, and signed it. We find nothing in the record to suggest clear error in the trial judge's finding that the statement was voluntary.

O'Looney's second contention is that the statement was the product of an illegal detention or arrest and therefore should have been suppressed under *Brown* v. *Illinois,* 422 U.S. 590 (1975). We reject this contention. As earlier indicated, the initial stop of O'Looney was supported by reasonable suspicion and was thus reasonable under the Fourth Amendment. He argues that after he was taken to the police station, the continued investigatory detention was unreasonable and the statement which, he argues, was the product of that detention, should have been suppressed. We disagree.

The continued investigatory detention of O'Looney was reasonable under the circumstances. The police had reason to believe O'Looney was connected with Harper's attempted illegal purchase. Their curiosity was aroused by the secrecy and intrigue surrounding the purchase of an otherwise legal weapon. They suspected that more was involved than a simple purchase with false identification; they thought O'Looney and Harper might be purchasing the firearm for an illegal purpose. It was not unreasonable to detain O'Looney temporarily at the station to await the arrival of federal officers who are more familiar with the federal firearms laws and more experienced in their enforcement. *Cf. United States* v. *Mayes,* 524 F. 2d 803,

806 (9th Cir. 1975); *United States* v. *Richards,* 500 F. 2d 1025, 1028-29 (9th Cir. 1974), *cert. denied,* 420 U.S. 924 (1975).

Moreover, we think the police had probable cause to arrest O'Looney even though he was not officially placed under arrest that day. At the time he was taken to the station, the police knew of Harper's crime, the positive connection between Harper and O'Looney from the automobile search and that O'Looney had lied about knowing Harper. This was an adequate showing of probable cause. Since an arrest would have been reasonable, the temporary investigatory detention was also reasonable.

Finally, even if there were an illegal detention, the statement need not be suppressed. *Brown* v. *Illinois, supra,* relied upon by O'Looney, held that the giving of *Miranda* warnings did not sufficiently attenuate the taint of an illegal arrest so as to render ensuing inculpatory statements admissible. But *Brown* does not purport to establish a per se rule that any statement following an illegal arrest is tainted. The Court instead reaffirmed the rule of *Wong Sun* v. *United States,* 371 U.S. 471, 486 (1963), that such a statement is admissible if it is "sufficiently an act of free will to purge the primary taint. . . ." 422 U.S. at 602 (quoting *Wong Sun*). The Court said that this question "must be answered on the facts of each case. No single fact is dispositive." *Id.* at 603. The Court noted that the giving of *Miranda* warnings is an important factor. Also important are the temporal proximity of the arrest and statement, the existence of intervening circumstances and particularly the purpose and flagrancy of the official misconduct. *Id.* at 603-04.

Examining each of these factors, we conclude that O'Looney's statement is not tained by the seizure of his

person, even if we assume it was illegally accomplished. The Supreme Court in *Brown* placed the greatest emphasis on the flagrancy of the Fourth Amendment violation. There, the police broke into and searched the defendant's apartment without a warrant. Upon the defendant's return home, he was arrested at gunpoint, also without a warrant. The police had no more basis for these acts than that the defendant was an acquaintance of a murder victim. *Id.* at 592-93. Here, at the very least, the police had a well-founded reasonable suspicion approaching probable cause to believe that O'Looney had committed a crime. There were neither drawn guns nor police actions calculated to cause surprise, fear and confusion. The detention was no more extensive than reasonably necessary to facilitate a brief inquiry into an apparent crime. Thus we need not be concerned with deterring purposefully illegal arrests for investigatory or other improper motives. *Id.* at 599-600; *id.* at 610-12 (Powell, J., concurring in part).

In comparison with *Brown,* the detention of O'Looney was at worst a minor violation of the Fourth Amendment. It was relatively nonintrusive on his personal privacy. He was originally detained on a public sidewalk and he voluntarily cooperated with officers in an effort to allay policy suspicion, unlike the forcible seizure of Brown by surprise at his home. Where the Fourth Amendment violation is less flagrant, a lesser showing is required to purge the later statement of taint. Here we hold that O'Looney's statement following the giving of *Miranda* warnings several hours after the initial detention[2] was sufficiently an

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2. This time span differs significantly from that in *Wong Sun,* where Toy's statement was made immediately after six or seven federal agents illegally broke open his

act of free will outside the causal chain of the alleged illegal detention.[3] To hold otherwise would be to invoke the Fourth Amendment exclusionary rule for a de minimis deterrent effect on errant police behavior, at a great cost to the legitimate demands of law enforcement. *See id.* at 602-03; *id.* at 608-12 (Powell, J., concurring in part).

III. The House Search

After giving his first statement at the station, O'Looney agreed to take the ATF agents to his house in Del Mar and allow it to be searched. Two weapons purchased by Harper were found and introduced into evidence at the trial. The district judge found that O'Looney's consent was voluntary. This finding also was not clearly erroneous.

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door and chased him into his bedroom where his wife and child were sleeping. 371 U.S. at 474, 486. *But see Brown* v. *Illinois, supra,* 422 U.S. at 604.

Indeed, the temporal interlude in O'Looney's case is of a sufficiently different nature as to warrant characterizing it as an intervening circumstance of significance. O'Looney waited in an interrogation room for over an hour after the initial questioning by the local detective before the ATF agents arrived. He was not questioned at all during this time and was free to reflect on the situation or to call his attorney. Whereas O'Looney had been evasive in answering the detective's questions concerning his connection with Harper and their purpose in purchasing the rifle, as soon as the ATF agents arrived, he discussed these matters openly and in some detail.

3. We think it significant that subsequent to his release, O'Looney returned with his attorney and made substantially the same statement as the one he now claims to be involuntary.

IV. Sufficiency of the Evidence

O'Looney contends that there was no evidence that he and Harper exported or conspired to export any weapons. Thus he argues that the government has failed to prove a conspiracy to violate 22 U.S.C. § 1934. Viewing the evidence in the light most favorable to the government, *United States* v. *Hood,* 493 F. 2d 677, 680 (9th Cir.), *cert. denied,* 419 U.S. 852 (1974), it is clear to us that the evidence supports the verdict.

O'Looney was deeply involved with the Irish unification movement and he had provided funds to purchase weapons. There is a substantial amount of circumstantial evidence that he intended the arms to be exported to Ireland and his two statements to federal officers are specific direct evidence on the issue. In the first statement, he admitted furnishing funds to Harper to obtain "armaments for the movement in Ireland." In the second statement in the presence of his attorney, he stated that he and Harper decided to get guns for Ireland. When O'Looney took the stand, he testified that he thought the guns were for the American Irish Republican Army and that he was not aware that the ultimate destination of the guns was Ireland. The jury had a right to disbelieve him and, with the additional facts in this case pointing to a contrary conclusion, could consider that disbelief as positive evidence of the opposite to which he testified. *United States* v. *Hood, supra,* 493 F. 2d at 680; *United States* v. *Cisneros,* 448 F. 2d 298, 305-06 (9th Cir. 1971).

V. The Special Verdict

The first count of the indictment charged a conspiracy with two objects: (1) exporting arms and (2) using false

documents. During its deliberations, the jury sent the court a note indicating some difficulty with this count.[4] As the court attempted to answer the jury's question, it became clear that the question resulted from a disparity between the indictment and the verdict form. The indictment charged a conspiracy to export "and" to falsify. The verdict form substituted "or" for "and." The substitution was proper since the jury was required only to agree that a conspiracy existed as to one of the unlawful objects charged in order to convict O'Looney on Count One. *See United States* v. *Friedman,* 445 F. 2d 1076, 1083-84 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971). But some jurors appeared to be confused even after the judge explained this point. To eliminate this confusion, it was suggested that the verdict form be retyped to allow the jury to find O'Looney guilty or not guilty of conspiracy for each of the two separate objects charged. Both attorneys agreed to this procedure. The jury then returned a verdict of guilty of conspiracy to export firearms and not guilty of conspiracy to falsify records.

Although there was no objection at trial, O'Looney now argues that he was irrevocably prejudiced by this procedure. We do not find any plain error requiring reversal. As a rule, special verdicts in criminal cases are not favored. *See United States* v. *Spock,* 416 F. 2d 165, 180-83

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4. The jury's note stated:

> There is a dispute on Count One, because it lists two different charges. Many of us feel definite about one part, but not about another. Our question: If we feel guilty or not guilty on one part, does that mean that the whole count must then follow suit? Please, again, define conspiracy.

(1st Cir. 1969). There is no per se rule, however, that such verdicts are absolutely forbidden. *See Heald* v. *Mullaney,* 505 F. 2d 1241, 1245 (1st Cir. 1974), *cert. denied,* 420 U.S. 955 (1975). Nor do we agree with O'Looney that the trial court lacked power to accept the special verdict form adopted here. *See United States* v. *Ogull,* 149 F. Supp. 272, 275-78 (S.D. N.Y. 1957), *aff'd sub nom. United States* v. *Gernie,* 252 F. 2d 664 (2d Cir.), *cert. denied,* 356 U.S. 968 (1958). Thus we must focus on the particular circumstances of this case. *Heald* v. *Mullaney, supra,* 505 F. 2d at 1246.

Most criticism of special verdicts in criminal cases is based on the danger that such verdicts might be devices for bringing judicial pressure to bear on juries in reaching their verdicts. Such criticism has been summarized:

> To ask the jury special questions might be said to infringe on its power to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations; and on its power to follow or not to follow the instructions of the court. Moreover, any abridgement or modification of this institution would partly restrict its historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case.

United States v. *Ogull, supra,* 149 F. Supp. at 276 (footnotes omitted).

But none of these dangers are present in the circumstances presented by this case. All the cases cited by O'Looney involved impositions of special verdicts on the juries, over the defendants' objections, at the outset of the juries' deliberations. Here, the judge did not impose

the special verdict, and O'Looney did not object.[5] The jury had deliberated for some time before asking for clarification of Count One. Even after the judge explained that they could find O'Looney guilty of the first count even if they found a conspiracy for only one of the two objects charged, one juror expressed confusion that "there is only one place to sign either guilty or not guilty. . . ." The judge took this as a request for a different verdict form and, with the approval of both attorneys, had the form retyped.

We do not see how O'Looney could have been prejudiced by this procedure. There is no suggestion that if the form had not been changed, the jury would have disregarded the judge's instruction and found O'Looney not guilty on the first count. We see no indication that judicial pressure was brought to bear on the jury and certainly not enough to constitute plain error; indeed, O'Looney received a fair trial. *See United States* v. *Jeffery,* 473 F. 2d 268, 271 (9th Cir.), *cert. denied,* 414 U.S. 818 (1973); *Herzog* v. *United States,* 235 F. 2d 664, 666 (9th Cir.) (en banc), *cert. denied,* 352 U.S. 844 (1956).

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5. O'Looney argues that his counsel approved this procedure without consulting him and that his counsel's failure to object is therefore not a waiver under the strict standard of *Johnson* v. *Zerbst,* 304 U.S. 458 (1968). That case, however, and its requirement that the accused himself consciously surrender a known right, is applicable only to certain fundamental rights, and not to strategic and tactical decisions, even if there are constitutional implications. *Estelle* v. *Williams,* ——U.S.——, —— n. 3 (1976); *United States* v. *Indiviglio,* 352 F. 2d 276, 280 (2d Cir. 1965) (en banc), *cert. denied,* 383 U.S. 907 (1966). In the circumstances of this case, O'Looney had no constitutional right to a general verdict. The rule of *Johnson* v. *Zerbst* is therefore inapplicable.

AFFIRMED.

HUFSTEDLER, Circuit Judge, dissenting in part:

I dissent from that portion of the majority opinion stating that O'Looney's statement need not be suppressed even if his detention was illegal. I agreed that his detention was not illegal, and the whole discussion is unnecessary to the decision. Upon the majority's assumed premise of illegality, I could not brush off the violation of the Fourth Amendment as *de minimis,* nor could I agree that O'Looney's acts and statement were either voluntary or purged from illegal taint. Illegal detention for hours in the coercive atmosphere of a police station is not lightly to be overlooked.

No. 76-456

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL O'LOONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

RICHARD L. THORNBURGH,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1976. The petition for a writ of certiorari was filed on September 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a statement made by petitioner and petitioner's consent to the search of his house were the product of an illegal detention.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner

was convicted of having conspired to export firearms, in violation of 18 U.S.C. 371 and 22 U.S.C. 1934.[1] He was fined $5,000 and placed on three years' probation.[2] The court of appeals affirmed (Pet. App.).

The evidence at trial, as summarized by the court of appeals (Pet. App. A3-A10), showed that petitioner and Shannon Harper had conspired to purchase firearms in the United States and illegally to export them to Ireland for use by the Irish Republican Army.[3] Petitioner supplied the money for the purchases and Harper, at times using false identification, purchased the weapons. On one such occasion, April 25, 1974, Harper's behavior aroused the suspicion of the store owner. After initially entering the store, Harper left and was seen talking to petitioner; he then reentered the store and placed a cash deposit on a semi-automatic rifle, using identification containing an address the store owner believed to be fictitious. The owner sent a letter to Harper at that address; it was returned marked "no such address".

When Harper returned a week later to pick up the rifle he had ordered, the store owner called the police. One of the officers who responded to the store owner's call questioned Harper and quickly determined that he had used false identification in attempting to make the purchase A neighbor of the store owner informed a second

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[1]Petitioner was acquitted on four counts charging him with having aided and abetted the making of false statements in connection with the purchase of firearms, in violation of 18 U.S.C. 2 and 924(a) (Pet. App. A2).

[2]Petitioner incorrectly states (Pet. 6) that he was placed on probation for five years.

[3]Harper was indicted with petitioner but pleaded guilty prior to petitioner's trial (Pet. App. A2).

officer that petitioner, who was walking on the sidewalk outside the store, appeared to be involved in the matter being investigated. The officer, Catherine Nance, therefore asked petitioner for identification and whether he knew the man in the gun store. Petitioner replied that he did not. Petitioner also told Officer Nance that he had a car a few blocks away and he agreed to permit her to search the car. Officer Nance then drove petitioner to the car and, after having obtained petitioner's written consent, searched the car. The search yielded a clothes bag that belonged to Harper.

The officers then took petitioner to the police station where, after having been given *Miranda* warnings, he again denied knowing Harper. Because the police had reason to believe petitioner and Harper had been attempting an unlawful purchase of a firearm, they called federal Alcohol, Tobacco and Firearms agents. The agents arrived approximately an hour later and again gave petitioner *Miranda* warnings. After brief questioning, petitioner signed a statement conceding that he and Harper had decided to obtain guns for Ireland. He also agreed to a search of his house, in the course of which the agents found two weapons that had been purchased previously by Harper.

ARGUMENT

Petitioner concedes (Pet. 11) that his original detention on the street for questioning was lawful. He argues, however, that his subsequent detention at the police station, during which he made an inculpatory statement and consented to the search of his house, was illegal because it was "solely for the purpose of 'investigation,' [and] without probable cause" (Pet. 17). The court of appeals correctly concluded, however, that although the police did not formally arrest petitioner prior

to the time he gave a statement and consented to the search of his house, they had probable cause to do so and that the detention was therefore lawful. The court of appeals also correctly concluded that, even assuming the officers lacked probable cause to arrest petitioner, his statement and consent were voluntary and were not tainted by the illegality of his detention.

a. Petitioner does not seriously dispute the voluntariness of his consent to the search of his car. In any event, as the court of appeals noted (Pet. App. A5-A6):

> [Petitioner] agreed to take the police to his car after only a few minutes of questioning on a public sidewalk. There were no drawn weapons, no evidence of handcuffs, no overt force and no threats. The trial judge found that the policewoman who obtained [petitioner's] consent was not "an overpowering woman and would [not] have scared [petitioner] into doing anything he didn't voluntarily want to do." [Petitioner] makes much of the fact that he was locked in the back of the police car for the short ride from the gun store to the car and during the search. He agreed to ride in the police car, however, while standing on the sidewalk. He was also out of the car and on the sidewalk when he agreed to the search. * * *
>
> We conclude from the totality of the circumstances that the trial court's finding of voluntary consent is not clearly erroneous. In fact, it appears that [petitioner] freely consented to the search in a voluntary effort to allay police suspicion. Indeed, [petitioner's] attorney argued to the jury that [petitioner] "freely and fully signed a consent, and permitted them to search his car."

As noted, even before the search of petitioner's car, the police officers had determined that Harper had

attempted to purchase a firearm with false identification. As a result of the search, they obtained evidence connecting petitioner and Harper and learned that petitioner had lied about knowing Harper. See *United States* v. *Gomori*, 437 F. 2d 312, 314 (C.A. 4). The officers therefore had probable cause to arrest petitioner at that time (see Pet. App. A7-A8). Thus, petitioner's contention that his subsequent statement and consent to the search of his house were the product of an illegal detention is without merit. See *Brown* v. *Illinois*, 422 U.S. 590.

b. Even if petitioner's detention at the police station was without probable cause, *Brown* v. *Illinois, supra,* does not require suppression of his statement and the evidence discovered during the search of his house. As the court of appeals noted (Pet. App. A8), this Court did not establish in *Brown* a *per se* rule that any statement made following an illegal arrest is tainted. Rather, *Brown* reaffirmed the holding of *Wong Sun* v. *United States*, 371 U.S. 471, that such a statement is admissible if it is "sufficiently an act of free will to purge the primary taint" (422 U.S. at 602), the Court noting that this question "must be answered on the facts of each case" (*id.* at 603). The Court also emphasized in *Brown* that, in determining whether the primary taint has been purged, courts should consider whether *Miranda* warnings were given, the temporal proximity of the arrest and statement, the existence of intervening circumstances and, particularly, the flagrancy of the official misconduct (*id.* at 603-604).

Applying these factors to the present case, the court of appeals concluded that (Pet. App. A8-A9)—

> [petitioner's] statement is not tainted by the seizure of his person, even if we assume it was illegally accomplished. The Supreme Court in *Brown* placed the greatest emphasis on the flagrancy of the

> Fourth Amendment violation. There, the police broke into and searched the defendant's apartment without a warrant. Upon the defendant's return home, he was arrested at gunpoint, also without a warrant. The police had no more basis for these acts than that the defendant was an acquaintance of a murder victim. * * * Here, at the very least, the police had a well-founded reasonable suspicion approaching probable cause to believe that [petitioner] had committed a crime. There were neither drawn guns nor police actions calculated to cause surprise, fear and confusion. The detention was no more extensive than reasonably necessary to facilitate a brief inquiry into an apparent crime. Thus we need not be concerned with deterring purposefully illegal arrests for investigatory or other improper motives. * * *

In contrast to the facts presented in *Brown*, the court further noted (Pet. App. A9-A10 (footnotes omitted)):

> [T]he detention of [petitioner] was at worst a minor violation of the Fourth Amendment. It was relatively nonintrusive on his personal privacy. He was originally detained on a public sidewalk and he voluntarily cooperated with officers in an effort to allay police suspicion, unlike the forcible seizure of Brown by surprise at his home. Where the Fourth Amendment violation is less flagrant, a lesser showing is required to purge the later statement of taint. Here we hold that [petitioner's] statement following the giving of *Miranda* warnings several hours after the initial detention was sufficiently an act of free will outside the causal chain of the alleged illegal detention. To hold otherwise would be to

> **invoke the Fourth Amendment exclusionary rule for a de minimis deterrent effect on errant police behavior, at a great cost to the legitimate demands of law enforcement. * * * [4]**

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[4]Since, as the court of appeals found (Pet. App. A9), petitioner's detention was not for improper motives and was "no more extensive than reasonably necessary to facilitate a brief inquiry into an apparent crime," petitioner's reliance upon *Mallory* v. *United States*, 354 U.S. 449, is misplaced. In *Mallory*, decided before *Miranda* v. *Arizona*, 384 U.S. 436, this Court condemned the practice of "arrest[s], as it were, at large" (354 U.S. at 456) for purposes of investigation or interrogation and admonished that "the delay [in presenting an accused before a magistrate] must not be of a nature to give opportunity for the extraction of a confession" (*id.* at 455). The Court thus erected a barrier against lengthy police interrogation designed to wear down a suspect's resistance; it required prompt arraignment to provide a break in the interrogation and to ensure that the accused was advised of his rights. Here, however, petitioner was advised on two occasions in accordance with *Miranda* and he was not subjected to continuous or psychologically coercive interrogation. As the court of appeals noted (Pet. App. A10 n. 2), after brief initial questioning petitioner was left alone in the interrogation room (where he was free to call an attorney) until the arrival of federal agents; and "as soon as the [federal] agents arrived, he discussed [the purchase of the rifle] openly and in some detail."

The lower court decisions relied upon by petitioner are pre-*Miranda*, and reflect *Mallory's* emphasis upon the role of the magistrate in providing advice to the accused of his constitutional rights. *E.g.*, *Greenwell* v. *United States* 336 F. 2d 962, 966 (C.A. D.C.). As the District of Columbia Circuit has recognized, "[a] valid *Miranda* waiver is necessarily, for the duration of the waiver, also a waiver of an immediate *judicial* warning of constitutional rights." *Frazier* v. *United States*, 419 F. 2d 1161, 1166 (emphasis in original). See also 18 U.S.C. 3501.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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